

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EUGENE D. BERNATH,	)	
d/b/a Bernath Farms,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-22-B-S
	)	
POTATO SERVICES OF	)	
OF MICHIGAN, INC.,	)	
	)	
Defendant/	)	
Third Party Plaintiff	)	
	)	
v.	)	
	)	
AGWAY, INC.,	)	
	)	
Third-Party Defendant	)	

***ORDER***

This matter is before the court on Eugene Bernath's motion to sever the third-party complaint and proceed against Potato Services of Michigan, Inc. (Docket No. 12.) Plaintiff makes this request because the third-party defendant, Agway, Inc., has filed Chapter 11 bankruptcy proceedings in New York State and is subject to the automatic stay created by 11 U.S.C. § 362 of the Bankruptcy Code. I now **Grant** Bernath's motion to sever. Potato Services has filed a letter requesting oral argument on the motion (Docket No. 14), but because the matter has been well briefed by the parties I see no need for oral argument and hereby **Deny** that request.

### **Factual Background**

Eugene D. Bernath owns and operates a farming business in Fulton County, Ohio. The defendant, Potato Services of Michigan, Inc., is a Michigan corporation that does business in the State of Ohio and allegedly sold seed potatoes to Bernath. According to Bernath, in 1999 he had a contract with Potato Services whereby they were to provide him with seed potatoes certified as Superior or better. Bernath received four shipments of potatoes in the spring of 2000 pursuant to this contract. He planted the potatoes, cultivated them, and then harvested them in the fall of 2000. According to the complaint, a farmer cannot visually determine the potato variety when planting them. It was only upon harvesting them that Bernath discovered that the potatoes he had been provided were Atlantic variety, a potato variety inferior in quality to the seed potatoes identified in the contract.

Bernath brought suit in the Ohio Court of Common Pleas in February 2001. Potato Services answered the complaint and brought a third party complaint against Agway, Inc., the entity from whom it had purchased the potatoes pursuant to a separate contract. Potato Services also filed a motion to dismiss the action, alleging that Bernath had brought suit in the wrong forum because a forum selection clause in the Bernath/Potato Services contract provided that any legal action had to be brought in the "Seed State of Origin." The State of Maine was listed as the seed state of origin in the contract. Agway, Inc. answered the third party complaint and removed the pending action to the United States District Court for the Northern District of Ohio on February 25, 2002.

Following a rather complicated procedural path, the case arrived in this court on February 6, 2003, pursuant to an inter-district transfer. The details of the procedural history are not relevant for purposes of the present motion. Suffice it to say that on March 11, 2003, Agway, Inc. filed a suggestion of bankruptcy with this court. On March 13, 2003, I held a telephone status conference with all parties to determine how to proceed with this matter. (Docket No. 5.) Following the entry of appearance by new counsel for the plaintiff and defendant and after a couple of additional status reports regarding the bankruptcy, on May 6, 2003, plaintiff filed the present motion to proceed against Potato Services and sever the third-party complaint. Potato Services filed its response on May 27, 2003. No other pleadings were filed in connection with the motion.

### **Discussion**

The First Circuit has adopted the general rule that the automatic stay imposed by 11 U.S.C. § 362 does not extend to litigation against non-debtor defendants. Austin v. Unarco Indus., Inc., 705 F.2d 1, 4-5 (1<sup>st</sup> Cir. 1983). However, the parties agree that under the Bankruptcy Code a bankruptcy court may stay proceedings against non-debtors in order to preserve the assets of an estate if “unusual circumstances” exist. See A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4<sup>th</sup> Cir. 1986). They disagree as to whether those “unusual circumstances” are present in this case. Therefore, I must examine the circumstances here to determine if there is any reason why this court should stay this action rather than sever the third party complaint and proceed with the litigation.

I find the reasoning of Algemene Bank Nederland, N.V. v. Hallwood Industries, Inc., 133 B.R. 176 (W.D. Pa. 1991) helpful to the present case. Algemene brought a collections action against Hallwood and Retail Acquisition Corporation (RAC).

Hallwood had assumed responsibility for a promissory note payable to Algemene and then Hallwood's repayment obligations on the note were assumed by RAC with Algemene's consent, although Hallwood remained liable on the note. After Algemene filed suit, Hallwood and other creditors forced RAC into bankruptcy proceedings. When Algemene was unable to recover against RAC, it proceeded with its suit against Hallwood. Hallwood argued that if Algemene obtained judgment against it, the judgment would, in effect, be a judgment against RAC due to the latter's absolute contractual duty to indemnify Hallwood.

The District Court declined to stay the action, noting that RAC had not requested a stay of the action in the bankruptcy court, a stay that could have been reviewed under normal bankruptcy procedural rules. Id. at 179. Instead, Hallwood wanted an indefinite de facto, and therefore un-reviewable, stay of the litigation against it pending RAC's reorganization. Id. The court noted that a bankruptcy stay against non-debtor defendants should either contribute to the debtor's efforts at rehabilitation or arise because the debtor and non-debtor are closely related. Id. Neither circumstance applied. Requiring Algemene to wait to collect from Hallwood until after RAC reorganized did nothing to further RAC's reorganization. Id. at 180. Similarly, a debtor and a non-debtor are not "closely related" within the sense contemplated by the Fourth Circuit's A.H. Robbins decision merely by virtue of an indemnification agreement. Id. After all, in the A.H. Robbins case the non-debtor defendant was the debtor's insurer against which suits had been commenced under state direct-action statutes. Id. The relationship is different from a contractual indemnification relationship.

The present case is even further removed from that sort of close relationship. Agway, Inc. was not even sued by Bernath as a direct defendant, an action which would have created some interrelationship between Agway and Potato Services. Bernath's cause of action arises entirely from the contract it had with Potato Services, just as Potato Services' cause of action against Agway arises entirely from a separate and distinct contract. Furthermore, Bernath has never sought any relief from Agway and making Bernath wait to recover from Potato Services will do nothing to assist Agway with its reorganization efforts. I see no reason why § 362 would compel a stay of this action.

Potato Services' second line of argument is that judicial economy compels a stay of this action until Agway, Inc. has emerged from bankruptcy proceedings. While it is true that there is a remote possibility that the factual issue relating to the seed potatoes will have to be re-litigated between Potato Services and Agway before the third party complaint can be resolved, that remote possibility does not, in my mind, justify delaying this case any longer. Furthermore, although the liquidated damages clauses in both contracts contain similar language, the enforceability of each clause will necessarily depend on the circumstances surrounding the formation of each of the separate contracts. Therefore, judicial economy does not justify staying the initial decision on the Bernath/Potato Services contract until Agway is ready to litigate the issue in the context of the Agway/Potato Services contract.

### **Conclusion**

Based upon the foregoing I will **GRANT** the motion to sever and allow Bernath's action against Potato Services to proceed and **DENY** Potato Services' motion for oral argument. If either party believes all or part of the case can be resolved on a summary

judgment motion based upon the present state of the record, they shall re-file such a motion that conforms to the District of Maine Local Rules by **July 30, 2003**. In the interim, I will issue a scheduling order that will govern any further discovery in this matter and establish a ready for trial date.

*So Ordered.*

June 25, 2003

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Margaret J. Kravchuk  
U.S. Magistrate Judge

**STANDARD**

**U.S. District Court  
District of Maine (Bangor)  
CIVIL DOCKET FOR CASE #: 1:03-cv-00022-JAW  
Internal Use Only**

BERNATH v. POTATO SERVICES OF  
MICHIGAN INC

Assigned to: JOHN A. WOODCOCK

Referred to:

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1441 Petition For Removal--Other  
Contract

Date Filed: 02/06/03

Jury Demand: None

Nature of Suit: 190 Contract: Other

Jurisdiction: Diversity

**Plaintiff**

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*aka*  
**BERNATH FARMS**

V.

**Bankrupt Party**

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**AGWAY INC**

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**Defendant**

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